No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM GIBBONS, Trustee of the Property of
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Petitioner,

v.

NATIONAL STEEL SERVICE CENTER, INC.,
Respondent.

PETITIONER'S REPLY BRIEF IN RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

BENNETT A. WEBSTER
BRUCE E. JOHNSON
ARTHUR E. GAMBLE
GAMBLE, RIEPE, BURT,
WEBSTER & DAVIS
2600 Ruan Center
Des Moines, Iowa 50309

O. L. HOUTS
CHICAGO, ROCK ISLAND AND
PACIFIC RAILROAD COMPANY
332 So. Michigan
McCormick Building
Chicago, Illinois 60604
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

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ARGUMENT

Respondent misconceives the thrust of the federal preemption rule and Petitioner's analogy to *Silkwood* v. *Kerr-McGee,* 667 F2d 908 (CA 10 1981). The compensatory property damage judgment *Silkwood* does not hold that a state law rule of strict liability for nuclear related property damage occurring off the plant site may not be preempted by federal law. The Court in *Silkwood* said that imposing such a state tort rule of strict liability "might, in some instances, encroach upon federal regulations setting effluent or other standards." *Id.* at 920. The Court cited *State Department of Environmental Protection* v. *Jersey Central Power & Light Co.,* 351 A2d 337 (NY 1976), and *Van Dissel* v. *Jersey Central Power & Light Co.,* 377 A2d 1244 (NJ 1977). In those cases the plaintiffs claimed damages on theories including strict liability because a nuclear plant's cooling system discharged water that changed the waterway from

fresh to salt water and/or changed the temperature of the water in the waterway. In both cases the New Jersey Court held federal regulations preempted state law strict liability claims for damages because federal law had preempted the area and monetary awards would interfere with federal regulations on cooling and discharge systems.

In *Silkwood* the property damage claim was for only $5,000. The Court said: "We do not think imposition of tort liability in the instant case, in which a quantity of plutonium had escaped the plant site and caused damage, will significantly interfere with the federal regulation of Kerr-McGee's plant." *Silkwood, supra,* at 920. The Court placed reliance upon its conclusion that:

> " 'Nuclear energy is surely an area' in which no court will, at last, refuse to recognize and apply the principle of strict liability'. W. Prosser, *The Law of Torts,* § 78, at 516 (4th ed. 1971); *see* Restatement (Second) of Torts, § 520, comment (g) (1977) * * *"

However, in transportation law the common carrier exception to liability without fault for extra-hazardous cargos in the rule in almost every jurisdiction. *Restatement (Second) of Torts,* § 521; Prosser, *The Law of Torts,* (1971), ch. 13 at 525.

Even in the early landmark case on escape of hazardous substances, *Rylands* v. *Fletcher,* L.R. 3 H.L. 330 (1968), Blackburn Judge, in the Court of Exchequer Chamber, conceded: "Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and, that being so, those who go on the highway or have their property adjacent to it may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger. *** In neither case therefore can they recover without proof of want of care or skill occasioning the accident."

In *Silkwood* the possession of the hazardous nuclear material was a voluntary commercial choice on the part of the defendant, Kerr-McGee, and the $5,000 property damage award did not interfere with federal regulations applying to the nuclear plant. In the present case the Railroad Trustee had possession of the hazardous material pursuant to a federally mandated transportation duty and was found by the jury not to have violated any federal track and roadbed standards, equipment standards, employee work standards, speed standards, or any state train operation standards or state negligence standards (even under a *res ipsa loquitur* jury instruction). The attempt of the Iowa Court to assess liability without fault is analagous to the attempt of the Trial Court to assess punitive damages in *Silkwood*. Where the purpose of Congress in legislating in an area is to secure uniformity of standards and principles of decision in that area, state law that supplements or compliments federal regulations "is as fatal as state regulations which conflict with the federal scheme:. *Campbell* v. *Hussey*, 368 US 297, 302 (1961); *Charleston & W.C. R. Co.* v. *Varnville Furniture Co.*, 237 US 597, 604 (1915).

In any event the *Silkwood* judgment awarding compensatory damages caused by radiation without any finding of violation of a federal safety statute or regulation is in direct conflict with this Court's recent and crystal clear dicta in *Pacific Gas and Electric Co., et al.* v. *State Energy Resources Conservation & Development Commission, et al.*, decided April 20, 1983, United States Law Week, Vol. 51, p. 4449. In *Pacific Gas* this Court said with regard to the regulation of the safety of nuclear energy, "When the federal government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.' " Compelling payment of a damage award is intended to be and is in fact "a potent method of governing conduct and controlling policy. *San Diego Unions* v. *Garmon*, 359 US 236, 247 (1959). A

state Court damage award with no finding fault on the part of the defendant conflicts with federal policy in the nuclear energy safety field. A no-fault damage award also conflicts with federal policy in the rail safety field in the case now before this Court.

The physical plants of rail companies cross state lines. In no other industry is the need for uniformity greater than the rail industry because of the peculiar interstate nature of its plant facilities, its essential importance to the nationa, and its generally low capital structure.

The Federal Railroad Safety Act of 1970 specifically states at 45 U.S.C. § 434:

> "The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce."

Awarding damages against a common carrier not at fault and in full compliance with all federal and state regulations is not "necessary to eliminate or reduce an essentially local safety hazard". Such local law is directly contrary to the Congressional mandate that "standards relating to railroad safety shall be nationally uniform to the extent practicable". Further, there

would be no liability, in the absence of fault, if the occurrence was in either Minnesota or Missouri.[1]

The Federal Hazardous Materials Transportation Act specifically states:

> "§ 1811. *Relationship to other laws*
>
> "General
>
> "(a) Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted.
>
> "State laws
>
> "(b) Any requirement, of a State or political subdivision thereof, which is not consistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is not preempted if, upon the application of an appropriate State agency, the Secretary determines in accordance with procedures to be prescribed by regulation, that such requirement (1) affords an equal or greater level of protection to the public than is afforded by the requirements of this chapter or of regulations issued under this chapter and (2) does not unreasonably burden commerce. Such requirement shall not be preempted to the extent specified in such determination by the Secretary for so long as such State or political subdivision thereof continues to administer and enforce effectively such requirement."

No application has been made by Iowa to the Secretary to change Iowa law and impose liability in the face of a jury verdict finding no negligence; and in view of the law in the other States

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[1] *Carl* v. *City of St. Paul*, 268 NW2d 908 (Mn. 1978); *Pecan Shoppe, etc.* v. *Tri-State Motor Transit Co.*, 573 SW2d 431 (Mo. App. 1978).

and the Trustee's compliance with all federal and state rules, the no fault money judgment against the Trustee does "unreasonably burden commerce".

Respondent National Steel Service Center, Inc. misconstrues the import of 49 U.S.C. §10103, formerly 49 U.S.C. §22, which states the remedies under the Interstate Commerce Act "are in addition to the remedies under another law or at common law." Respondent misapprehends the import of §10103. In *Chelentis* v. *Luckenbach S.S. Co.*, 247 US 372, 382-384, 62 L.Ed. 1171, 1176-1177, 38 S.Ct. 501 (1917), the Court construed a saving statute which, like §10303, preserved common law remedies. In *Chelentis, Id.* at 247 US 383, the Court approved the statement: "It is not a remedy in the common-law courts, which is saved, but a common-law remedy." The Court in *Chelentis* held:

> "The distinction between rights and remedies is fundamental. A right is a well-founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Bouvier's Law Dict. Plainly, we think under the saving clause a right santioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea."

A damage remedy permitted under state law may be obtained for violation of a federal statute or regulation governing interstate rail carriers. A damage remedy permitted under state law may be obtained for violation of a state law standard only to the extent the standard does not contravene the guidelines set out in 45 U.S.C. §434, 49 U.S.C. §1811, or other similar statutes, and does not interfere with federal regulations or otherwise unduly interstate commerce.

CONCLUSION

The jury in this case determined that there was no violation of a state tort law protecting an essential local interest, nor any violation of a federal regulatory standard. In these circumstances, the *Clearfield*[1] doctrine establishes "In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards". It is, thus, a federal question whether the Railroad can be held liable without fault and in the absence of a body of federal common law and in the interests of uniformity the common carrier exception to liability for carriage of hazardous materials set forth in the *Restatement* should be applied by the Federal Courts.

Respectfully submitted,

Bennett A. Webster
Bruce E. Johnson
Arthur E. Gamble
GAMBLE, RIEPE, BURT,
WEBSTER & DAVIS
2600 Ruan Center
Des Moines, Iowa 50309

O. L. Houts
CHICAGO, ROCK ISLAND AND
PACIFIC RAILROAD COMPANY
332 So. Michigan
McCormick Building
Chicago, Illinois 60604

Attorneys for Petitioner

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[1] *Clearfield Trust Co. v. US*, 318 US 363; 87 L.Ed. 838; 63 S.Ct. 754 (1943).